

ORIGINAL

SEP 11 1990

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

- - - - -x

In the Matter of: :
1989 JUKEBOX ROYALTY : Docket No. 90-3-89JD
DISTRIBUTION PROCEEDING :
:

- - - - -x

MOTION OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS
TO DISMISS CLAIM OF CARL K. DEMONBRUN

The American Society of Composers, Authors and Publishers ("ASCAP") hereby moves to dismiss the claim of Carl K. DeMonbrun to 1989 jukebox royalties, pursuant to the Copyright Royalty Tribunal's Rules of Procedure, 37 C.F.R. §301.51. Mr. DeMonbrun's claim is improper because ASCAP filed a claim for 1989 and Mr. DeMonbrun was a member of ASCAP during 1989. His separate claim is therefore subsumed within ASCAP's claim and, by statute, is improper.

The Copyright Act is very specific as to which claimants are entitled to receive jukebox compulsory license fees. The Act mandates that: "The fees to be distributed shall be divided as follows." 17 U.S.C. §116(c)(4) (emphasis added). The Act continues by specifying only two groups to whom distributions shall, sequentially, be made:

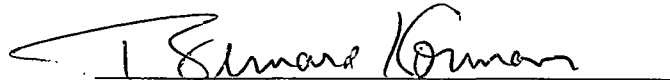
avoid. It should be dismissed. Mr. DeMonbrun will then be treated exactly as all other ASCAP members are treated: he will receive any royalty distributions to which he is entitled pursuant to ASCAP's distribution system, as he has agreed in his ASCAP membership agreement.

IV. CONCLUSION

The claim of Carl K. DeMonbrun should be dismissed.

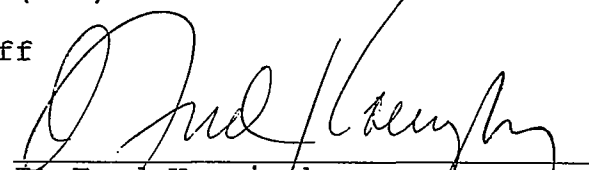
Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS



Bernard Korman
ASCAP
One Lincoln Plaza
New York, New York 10023
(212) 870-7510

Of counsel: Bennett M. Lincoff



I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8806

Dated: September 10, 1990

First, "to every owner not affiliated with a performing rights society, the pro rata share" Id. Mr. DeMonbrun does not fit into this category, for he is an owner who is affiliated with a performing rights society, by virtue of his membership in ASCAP during 1989.^{1/} (See, affidavit of Paul S. Adler, submitted herewith.)

Second, "to the performing rights societies, the remainder of the fees" Id. Mr. DeMonbrun does not fit into this category, for, as a member of ASCAP, he cannot be a "performing rights society" himself. See, generally, Final Determination of the Distribution of the 1985 Jukebox Royalty Fund, 52 Fed. Reg. 46,324, 46,326 (1987) (Italian Book Corp., which claimed to be a "performing rights society," had in fact been a publisher member of ASCAP.)

These statutory provisions show that Congress intended the result that common sense and the conditions of membership in or affiliation with a performing rights society requires: that the Tribunal not be subjected to multiple claims by copyright owners. Any other result would lead to an administrative nightmare.

Mr. DeMonbrun's claim is exactly the sort of duplicative claim the statutory framework was designed to

^{1/} Indeed, ASCAP filed a claim to 1989 jukebox royalties on behalf of all its members, including Mr. DeMonbrun. See, ASCAP claim filed January 3, 1990. And, by virtue of his ASCAP membership, Mr. DeMonbrun authorized ASCAP to so file and receive payment on his behalf. See, ASCAP Membership Agreement attached to affidavit of Paul S. Adler, submitted herewith.

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

- - - - -X

In the Matter of: :
1989 JUKEBOX ROYALTY : Docket No. 90-3-89JD
DISTRIBUTION PROCEEDING :
:

- - - - -X

AFFIDAVIT OF PAUL S. ADLER
IN SUPPORT OF MOTION OF THE
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS TO DISMISS
CLAIM OF CARL K. DEMONBRUN

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

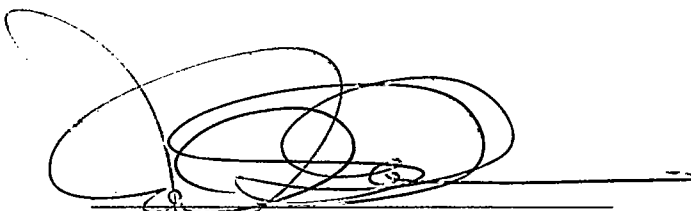
PAUL S. ADLER, being duly sworn, states:

1. I am Director of Membership of the American Society of Composers, Authors and Publishers ("ASCAP").

2. Attached as Exhibit "A" is a photocopy of the ASCAP membership agreement of Carl K. DeMonbrun, dated February 20, 1986, and effective for the period January 1, 1986 through December 31, 1995. This agreement is kept as part of ASCAP's normal business records.

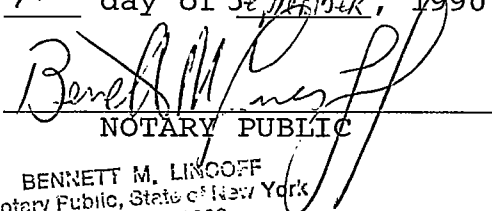
3. Members of ASCAP may resign in accordance with their ASCAP membership agreements. I have checked ASCAP's records and find that Mr. DeMonbrun has not resigned

and therefore he is an ASCAP member at this time, as he was
a member in 1989.



Paul S. Adler

Sworn to before me this
7th day of September, 1990.



NOTARY PUBLIC

BENNETT M. LINCOFF
Notary Public, State of New York
No. 31-4563386
Qualified in New York County
Commission Expires Aug. 4, 1988
1992

1986-1995

No.

Rec'd MAR 4 1986

Agreement Between

CARL KEVIN DE MONBRUN

AND

American Society
OF
Composers, Authors & Publishers

1 LINCOLN PLAZA
NEW YORK, N. Y. 10023

Dated: February 20 1986

ascap

AGREEMENT made between the Undersigned (for brevity called "Owner") and the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (for brevity called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

1. The Owner grants to the Society for the term hereof, the right to license non-dramatic public performances (as hereinafter defined), of each musical work:

Of which the Owner is a copyright proprietor; or

Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or

In which the Owner may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The right to license the public performance of every such musical work shall be deemed granted to the Society by this instrument for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby granted shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the Owner and/or others, as well as the right to sue under such copyrights in the name of the Society and/or in the name of the Owner and/or others, to the end that the Society may effectively protect and be assured of all the rights hereby granted.

(b) The non-exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this grant the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The non-exclusive right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound other than television broadcasting.

(d) The non-exclusive right of public performance by television broadcasting; provided, however, that:

(i) This grant does not extend to or include the right to license the public performance by television broadcasting or otherwise of any rendition or performance of (a) any opera, operetta, musical comedy, play or like production, as such, in whole or in part, or (b) any composition from any opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form) in a manner which recreates the performance of such composition with substantially such distinctive scenery or costume as was used in the presentation of such opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form): provided, however, that the rights hereby granted shall be deemed to include a grant of the right to license non-dramatic performances of compositions by television broadcasting of a motion picture containing such composition if the rights in such motion picture other than those granted hereby have been obtained from the parties in interest.

(ii) Nothing herein contained shall be deemed to grant the right to license the public performance by television broadcasting of dramatic performances. Any performance of a separate musical composition which is not a dramatic performance, as defined herein, shall be deemed to be a non-dramatic performance. For the purposes of this agreement, a dramatic performance shall mean a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action. The use of dialogue to establish a mere program format or the use of any non-dramatic device merely to introduce a performance of a composition shall not be deemed to make such performance dramatic.

(iii) The definition of the terms "dramatic" and "non-dramatic" performances contained herein are purely for the purposes of this agreement and for the term thereof and shall not be binding upon or prejudicial to any position taken by either of us subsequent to the term hereof or for any purpose other than this agreement.

(e) The Owner may at any time and from time to time, in good faith, restrict the radio or television broadcasting of compositions from musical comedies, operas, operettas and motion pictures, or any other composition being excessively broadcast, only for the purpose of preventing harmful effect upon such musical comedies, operas, operettas, motion pictures or compositions, in respect of other interests under the copyrights thereof; provided, however, that the right to grant limited licenses will be given, upon application, as to restricted compositions, if and when the Owner is unable to show reasonable hazards to his or its major interests likely to result from such radio or television broadcasting; and provided further that such right to restrict any such composition shall not be exercised for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition, and provided further that in no case shall any charges, "free plugs", or other consideration be required in respect of any permission granted to perform a restricted composition; and provided further that in no event shall any composition, after the initial radio or television broadcast thereof, be restricted for the purpose of confining further radio or television broadcasts thereof to a particular artist, station, network or program. The Owner may also at any time and from time to time, in good faith, restrict the radio or television broadcasting of any composition, as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in the repertory of Society or on a claim by a non-member of Society that Society does not have the right to license the public performance of such composition by radio or television broadcasting.

2. The term of this agreement shall be for a period commencing on the date hereof and expiring on the 31st day of December, 1995.

3. The Society agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the Owner, to the uses and purposes as provided in its Articles of Association (which are hereby incorporated by reference), as now in force or as hereafter amended.

4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the Owner and/or in the name of the Society, or others in whose names the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time, to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or The Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio and television broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatic-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

12. The grant made herein by the owner is modified by and subject to the provisions of (a) the Amended Final Judgment (Civil Action No. 13-95) dated March 14, 1950 in U. S. A. v. ASCAP as further amended by Order dated January 7, 1980, (b) the Final Judgment (Civil Action No. 42-245) in U. S. A. v. ASCAP, dated March 14, 1950, and (c) the provisions of the Articles of Association and resolutions of the Board of Directors adopted pursuant to such judgments and order.

SIGNED, SEALED AND DELIVERED, on this 20th day of February, 1986

Owner

Carl De Monbun
CARL DE MONBUN

CARL KEVIN DE MONBUN

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS.

Society

By

President

FOREIGN AGREEMENTS AT THIS DATE IN EFFECT

(See paragraph 11 of the within agreement)

[illegible]

702

CERTIFICATE OF SERVICE

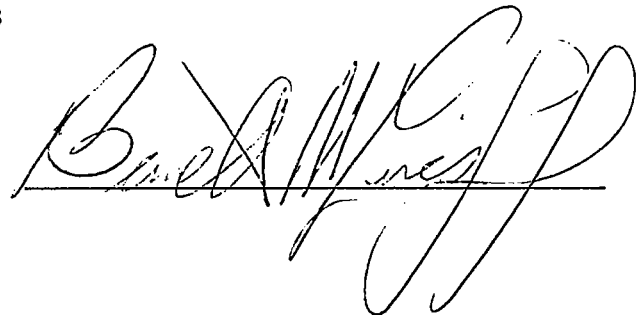
I hereby certify that a copy of the foregoing Motion of the American Society of Composers, Authors and Publishers was served by overnight delivery this 10th day of September 1990 to the following parties:

Charles T. Duncan
Reid & Priest
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

Laurie Hughes
SESAC, Inc.
55 Music Square East
Nashville, TN 37203

Carl K. DeMonbrun
Polyphonic Music, Inc.
JRF P.O. Box 7894
New York, NY 10016

Carl K. DeMonbrun
Polyphonic Music, Inc.
Citicorp
399 Park Avenue
New York, NY 10043

A handwritten signature in dark ink, appearing to read "Carl K. DeMonbrun", is written over a horizontal line. The signature is stylized with large, flowing loops and a prominent "C" at the beginning.